YENG HING ENTERPRISE SDN. BHD.

v.

DATUK DR. ONG POH KAH

HIGH COURT BORNEO, KOTA KINABALU
ABU MANSOR ALI J
[CIVIL SUIT NO. S.88 OF 1984]
28 NOVEMBER 1986

CIVIL PROCEDURE: *Application under O. 14 of the Rules of the High Court 1980 - Breach of fiduciary duty by director - Misappropriation of funds - Unreasonable delay in application - Section 92 of Evidence Act - Section 354 of the Companies Act of 1965 - Interest on sums.*

The plaintiffs instituted an action against the defendant for breach of fiduciary duty as a director. It was alleged that he had misappropriated various sums of money from the plaintiff company's fixed deposit account. The plaintiffs claimed the sum misappropriated less a sum returned plus interest up to 27 April 1984. The plaintiffs applied for summary judgment for the amount under O. 14 of the Rules of the High Court 1980, dated 30 May 1986 plus compound interest thereon at 9.75% per annum from 27 April 1984 to the date of judgment or at other interest rate as the Court thinks fit and the usual statutory interest. The plaintiffs also applied for a declaration that an account of all profits and interest made by the defendant to the principal sum of the plaintiffs' money and an order that the defendant pay the plaintiffs such sums that may be due upon the taking of such accounts and the costs of the application.

A number of issues were raised in the application.

(i) Was the defendant duly authorized to withdraw the sum and deposit it in his personal account in Hong Kong?

(ii) If the Court found the defendant ought to return the sum claimed should he be relieved from the liability of having to return the money in pursuance of s. 354 of the Companies Act of 1965?

(iii) Were the plaintiffs entitled to ask for compound rather than simple interest?

Held:

[1] The delay of two years in making the application was mainly due to their desire to accommodate the defendant. In spite of the delay of two years the Court could still entertain the application and give judgment if the delay can be explained as had been in this instance.

[2] The defendant had raised a triable issue that should be determined at trial as to whether the interest should be simple or compound. On this issue alone the defendant was entitled to have this issue tried in the circumstances of the case.

[3] Apart from (ii) above it was also held that after a consideration of the issues in their entirety the defendant had succeeded in satisfying Court that he was entitled to have an order for trial under the heading "Some other Reason for Trial" in the 1982 Supreme Court Practice (White Book).

[4] The circumstances of the case required close investigation. Some of the contentions of the defence could only be established after evidence had been led.

[Plaintiffs' application dismissed with costs to be taxed.]

Cases referred to:
Tractors Malaysia v. Joseph Thambirajah [1986] CLJ (Rep) 752
Wallesteiner v. Moir (No. 2) [1975] 1 QBD 373
Re Claridge's Patent Asphalte Co. Ltd. [1921] 1 Ch 543
Miles v. Bull [1969] 1 QB 258; [1968] 3 WLR 1090
Daimler Co. Ltd v. Continental Tyre etc., Ltd. [1916] 2 AC 326
Harrison v. Bottenham [1878] 26 WR 362
Crump v. Cavendish [1880] 5 EX d 214

Legislation referred to:
Companies Act 1965, ss. 156(1)(a), 354
Evidence Act 1950, s. 92
Rules of the High Court 1980, O. 14, O. 18

Other source referred to:
Supreme Court Practice (White Book) 1982, p. 169

For the plaintiffs - Anne Wong; M/s. Skinner Lind Robertson Willie Wong & Chin Co.
For the defendant - William Liaw; M/s. William Liaw Chan & Co.

JUDGMENT

Abu Mansor Ali J:

The plaintiffs instituted this claim against the defendant for breach by the defendant of his fiduciary duties as a trustee between December 1980 and July 1981 in that the defendant wrongfully and without authority as a director of the plaintiffs misappropriated various sums totalling RM3,233,485.97 from the plaintiffs' company's fixed deposit account bearing receipt Nos. 565,567,596, 598 and the current account No. 3-638 with the Sandakan Malayan Banking Berhad for his own use. The plaintiffs claimed that sum less RM3,022,739.47 returned by the defendant plus interest as at 27 April 1984 amounting to RM189,472.73 bringing the total claim to RM400,219.23.

The plaintiffs in consequence applied for summary judgment for this amount of RM400,219.23 under O. 14 of the Rules of the High Court 1980 dated 30 May 1986 claiming compound interest thereon at 9.75% per annum from 27 April 1984 to the date of judgment or at other interest rate as the Court thinks fit and the usual statutory interest. Apart from this the plaintiffs also applied for a declaration that an account of all profits and interest made by the defendant to the principal sum of the plaintiffs' money and an order that the defendant do pay the plaintiffs such sums that may be due upon the taking of such accounts and costs of this application. The application was supported by the affidavit of Chin Thin Cho, the plaintiffs' company secretary, sworn on 1 April 1986, who deposed that the defendant was at the commencement of this action justly and truly liable to return to the plaintiffs moneys in the sum of RM400,219.23 with interest.

This matter was adjourned to open Court for argument on 8 October 1986 and at the commencement of argument Counsel for the defendant raised a preliminary objection that there was a delay in their making of this summary judgment application of some two years and that the onus of explaining that delay is on the plaintiffs. Writ was filed on 26 June 1984 and served on 8 August 1984 defence was filed on 7 October 1984. Plaintiffs then applied under O. 18 for particulars on 8 October 1985 and handed it on 22 October 1985 and particulars were delivered on 2 November 1985. The application under O. 14 had only been made on 1 April 1986, two years after the writ had been taken out. In justification the plaintiffs cited a few authorities and I need only cite *Tractors Malaysia v. Joseph Thambirajah* [1986] CLJ

(Rep) 752 where my brother, Dr. Zakaria Yatim J, held that inspite of the delay of two years the Court could still entertain the application and give judgment if the delay can be explained. I accept Counsel for the plaintiffs' explanation that delay was justified. Plaintiffs requested for board minutes for 1980, 1981 and 1982 and for particulars of defendant's defence but was initially ignored. They have to apply by summons and only supplied in November 1985 - one year after defence was filed. There was also attempt to have this matter settled out of Court as parties' approach was to avoid a protracted litigation and I held that whatever delay there had been, from the affidavits filed, they were to accommodate the defendant such as granting of extra time for him to produce the relevant minutes. I dismissed defendant's preliminary objection and I proceeded to hear the argument in open Court on the summons.

It is not disputed from the affidavit and defence filed that the various sums taken by the defendant was in fact the above sum and the amount returned was only RM3,022,739.47.

The first issue raised was whether the defendant was duly authorised to withdraw the said total sum and to put the same in his personal account in Hong Kong. He was asked to return the sum and he could return only a sum of RM210,746 being principal and he also could not produce minutes authorising withdrawals of those funds although ample time was given to him to do so.

The plaintiffs' Counsel submitted that it is a requirement of s. 156(1)(a) of the Companies Act that minutes shall be kept and Article 119 of the company also makes such requirement. In the face of this requirement the plaintiffs submitted that it is not then open for the defendant to bring oral evidence as he alleges he can do in encl. (9) to prove that the defendant had been so authorised to withdraw those sums he did not dispute he did. Plaintiffs also cited s. 92 of the Evidence Act 1950, and she submitted that since no such resolution could be produced the inference is that there was none. The defendant could not be allowed to give oral evidence to prove that there was in fact such a resolution.

The second issue raised by the defendant in encl. (9) was that if the Court finds that defendant ought to return the amount claimed, then the defendant alleged that he is under s. 354 of the Companies Act 1965, to be relieved thereunder from having to return the company's money. As for this the plaintiffs deny that s. 354 thereof was applicable to the present case. In the first place for it to be applicable the present case was not a claim by the plaintiffs for damages for breach of trust, default or negligence in the handling of the company's money for company's purpose or benefit. In the circumstances, the plaintiffs' money were in various accounts on fixed deposits earning various rates of interest and maturing at different times when they were withdrawn by the defendant and when he did so the plaintiffs alleged the defendant had not acted reasonably and ought to be excused. In fact the plaintiffs alleged the defendant acted recklessly as the withdrawal was without the company board's sanction and when the company did not have an account in Hong Kong the money was put in defendant's own account.

From the facts placed before the Court it is clear that the withdrawal of the money from the various accounts could not be for the company's benefit and was never intended, in the circumstances, to be so and the defendant there, in my view, lost his entitlement to obtain relief under that s. 354 of that Act.

On interest, Counsel for the plaintiffs submitted they were entitled to ask for compound interest instead of the simple interest. The defendant was a director of the plaintiffs' company and the money were then in fixed deposits earning interest when they were withdrawn and put into defendant's account. She cited *Wallesteiner v. Moir (No. 2)* [1975] 1 QBD 373 of

bundle (encl. (10)) where compound interest was awarded whenever money is misused by an executor or a trustee or anyone else in a fiduciary position who has misapplied the money and made use of it himself for his own benefit.

On the first issue as to whether the defendant was authorised to withdraw the money, Mr, William Liaw for the defendant conceded that his client did not have what can be described as the Board's authority to effect the withdrawal. That is obvious for if there was the Board's authority there would have been no need to have these proceedings against the defendant.

Counsel for the defendant, however, urged on the Court to look at the circumstances of the withdrawal of the money. Although it was not done with the Board's authorisation but certainly at the behest of at least two directors who normally must have signed documents. The money was placed in Hong Kong in the defendant's personal name but never used for his personal gain or for use for any of his purposes. When asked to remit back he did so but due to exchange rate there was a shortfall of RM210,000. He did not have custody of fixed deposit receipt but it was kept by either under lock and key.

Defence Counsel further submitted that on the question of whether the defendant acted honestly the Court can only form its conclusion after hearing his testimony and the testimony of other directors at a proper trial and trials by affidavit could not serve the purpose. He said if the Court should find that the defendant had acted *bona fide* he should be relieved from liability by Court under s. 354 of the Companies Act. He cited *Re Claridge's Patent Asphalte Co. Ltd.* [1921] 1 Ch 543. Counsel for defendant submitted that the defendant acted under the mistaken belief that he had authority.

As regards interest, Counsel for the defendant drew the Court's attention to what the plaintiff is asking. The plaintiff is asking for judgment on RM400,000 with compound interest thereon at 9.75% per annum from 27 April 1984 to the date of judgment and thereafter the statutory interest. Counsel submitted that Court would only so order, on the authority of *Wallesteiner v. Moir (No. 2) (CA)* [1975] 1 QBD 373, if money had been used of by the director for his "own benefit". In the present case defendant had not made use of the money for personal purpose. He had the money withdrawn on about 2 December 1980 and when asked to return the money was returned in three amounts on 20 October 1981, 23 October 1981, and 27 February 1982.

Counsel further explained that the sum of RM400,219.23 in statement of claim included already a sum of RM189,472.73, interest as at 27 April 1984. The plaintiffs had already charged compound interest at 9.75% on the different amounts in the statement of claim. Whereas the then existing rate before the money was withdrawn was only 6.75% and 7.75%. From para. 4 of the statement of claim it would appear that 9.5% was fixed by the resolution of the directors.

The original principal sum was RM210,746.50 and plaintiffs claimed RM400,000 with a built-in interest of RM189,472.73. There was a delay by plaintiffs in issuing the writ - issued only on 20 June 1984. There was therefore a delay of some three years. The defendant should be given relief on interest lost. Due to the delay the amount had been inflated and this placed a heavier burden on the defendant. Defendant's Counsel urged on the Court to look at the circumstances as a whole.

He also urged on the Court if it should be mindful to give judgment for the plaintiffs it should be judgment on the shortfall with simple interest (excluding the sum of RM189,472.73).

I am in agreement with Counsel for the defendant that as the sum of RM400,000 claimed had already included RM189,472.73 as interest and this rate of interest had been fixed by resolution of plaintiffs' directors, I find that the defendant had succeeded in raising a triable issue to be determined at trial as to whether the interest should be simple or compound. On this issue alone I hold that the defendant is entitled to have this issue tried in the circumstances of this case.

Apart from the above I also find that after considering the issues raised as a whole in this summons I find that the defendant had succeeded in satisfying me that he may have an order for trial under the heading "Some other Reason for Trial" in the 1982 *Supreme Court Practice (White Book)*. I set down in full the explanatory note in the 1982 *Supreme Court Practice* p. 169 as follows:

> Some other Reason for Trial: The former O. 14, r. 1, provided that the defendant should have leave to defend if he 'shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally.' These words have been replaced in r. 3(1) by the words that the defendant should have leave to defend if he satisfies the Court 'that there ought for some other reason to be a trial' of the claim or part to which the summons for judgment relates. These words, if anything, are wider in their scope than the former. It sometimes happens that the defendant may not be able to pin-point any precise 'issue or question in dispute which ought to be trial', but nevertheless it is apparent that for some other reason there ought to be a trail (see per Megarry J, in *Miles v. Bull* [1969] 1 QB 258; [1968] 3 WLR 1090, 1096); e.g., that the plaintiff is incapable of giving or has not given a retainer to bring the action (see *Daimler Co. Ltd. v. continental Tyre etc., Ltd.* [1916] 2 AC per Lord Atkinson at p. 326 and per Lord Parker at p. 346), or that the defendant reasonably and properly requires to interrogate or cross-examine the plaintiff (see *Harrison v. Bottenheim* [1878] 26 WR 362) or that the defendant is an executor or administrator who can raise facts by reference to the existence or absence of letters, accounts or such like of the deceased which makes it reasonable to require full discovery of documents so that there ought to be a trial. Whenever there are circumstances which require to be closely investigated there ought to be a trial judgment should not be given under O. 14 (*Miles v. Bull* [1969] 1 QB 258; [1968] 3 WLR 1090, applying the language of Lord Parker in the *Daimler* Case, *supra*). See also *Crump v. Cavendish* [1880] 5 Ex D 214.

In the present case there are circumstances which require it to be closely investigate; that there ought to be a trial and judgment should not be given under O. 14 (*Miles v. Bull* [1969] 1 QB 258). It is clear that the withdrawal of those sums were with the aid of the directors mentioned by the defendant else it could not be done. Though the defendant could not absolutely shelter under that fact that they helped, nonetheless, it could throw some light and assist the Court to know how much portion of the blame is really on the defendant. Once the whistle is blown it is understandable they would not come forward to own up but at the trial the defendant could cross-examine the directors who were signatory to cheques to transfer the money and tell the Court what part they played. it has also been alleged that this shortfall was due to the fall in the rates of exchange as the money was remitted through Singapore. Evidence would be required to establish this. All these factors go to influence my judgment that there should be trial. I, therefore, exercise my discretion and allow the defendant to defend this action unconditionally. The plaintiffs' application is hereby dismissed with costs to be taxed.

Also found at [1988] 2 CLJ 554